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In The
Supreme Court of the United States

PENNY NELSON, for herself and as
Personal Representative of the Estate of Decedent,
DOUGLAS NELSON,

Petitioner,

v.

U.S. OFFICE OF PERSONNEL MANAGEMENT,

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

PETITION FOR A WRIT OF CERTIORARI

KRISTIN HOUSER*
SCHROETER GOLDMARK & BENDER
810 Third Avenue #500
Seattle, WA 98104
(206) 622-8000
Counsel for Petitioner

February 17, 2006

**Counsel of Record*

QUESTION PRESENTED

Whether the Ninth Circuit erred by failing, in contravention of federal common law, to construe an ambiguous insurance contract that was issued pursuant to the Federal Employees Health Benefits Act, 5 U.S.C. §8901 et seq. (FEHBA) in favor of the insured.

STATEMENT REQUIRED BY RULE 14.1

Pursuant to Supreme Court Rule 14.1, petitioner states that all parties to the proceeding in the court whose judgment is sought to be reviewed are included in the caption.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Penny Nelson, personal representative of the estate of Douglas Nelson, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The order of the Court of Appeals on the Nelson's petition for rehearing and suggestion of rehearing en banc was entered on November 23, 2005, is unreported and is reprinted in the Appendix to this Petition ("Pet. App.") at 19. The underlying opinion of the Court of Appeals was entered on September 8, 2005, is unreported and is reprinted at Pet. App. 1-3. The order of the United States District Court for the Western District of Washington granting summary judgment was entered on February 3, 2004, is unreported and is reprinted at Pet. App. 4-12.

JURISDICTION

The opinion of the Court of Appeals was entered on September 8, 2005 and the order of the Court of Appeals denying Nelson's petition for rehearing and suggestion of rehearing en banc was entered on November 23, 2005. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

This petition involves the following provisions of the Federal Employees Health Benefits Act, 5 U.S.C. §§ 8902(e) and (j), 8903, 8907, and 8912, which are reprinted at Pet. App. 20-25.

STATEMENT OF THE CASE

Petitioner is the widow of a career federal employee; her husband, Douglas Nelson worked as a machinist and in the planning and estimating office at the Puget Sound Naval Shipyard in Bremerton, Washington. As a result of his work at the shipyard, he was exposed to asbestos and contracted mesothelioma, an incurable cancer of the lining of the lung that typically kills its victims within months. Pet. App. 32. After being diagnosed with mesothelioma, Mr. Nelson filed a worker's compensation claim through the federal Office of Workers' Compensation Programs ("OWCP") and a civil lawsuit against the companies whose asbestos products he was exposed to. OWCP determined that his mesothelioma was work-related and began covering the medical services he received to treat his cancer. After he settled his case against the asbestos manufacturers for approximately \$1.3 million,¹ OWCP stopped paying anything for his care, and Mr. Nelson paid OWCP back the funds already expended on his behalf. Pet. App. 35-36. OWCP further notified Mr. Nelson that it would not pay any further benefits until he had expended \$520,330.77 for medical or other needs related to his mesothelioma. Pet. App. 34.

¹ This is a gross figure, before fees, costs and liens were taken out.

Mr. Nelson also carried health insurance through Kitsap Physicians' Service ("KPS"), an approved carrier under FEHBA. When he was notified that OWCP would not cover his medical care, he began submitting claims to his insurance company, KPS. At first, KPS paid the claims; however, in April of 2001 it began denying coverage based on the following exclusion clause:

We do not cover services that:

- You need because of a workplace-related illness or injury that the Office of Workers' Compensation Programs (OWCP) or a similar Federal or State agency determines they must provide; or
- OWCP or a similar agency pays for through a third party injury settlement or other similar proceeding that is based on a claim you filed under OWCP or similar laws.

Pet. App. 17. This "workers compensation exclusion" was contained in a summary of benefits provided to Mr. Nelson pursuant to the Federal Employment Health Benefits Act, 5 U.S.C. § 8907(b)(1), which requires carriers approved under FEHBA to provide those federal employees who enroll in a plan with a document "summarizing the services or benefits, including maximums, limitations, and exclusions. . . ."

In this case, OWCP determined that Mr. Nelson was *not* eligible for benefits and did *not* pay for or provide medical services for Mr. Nelson. Thus, Mr. Nelson challenged KPS' denial of his claims on the basis of an exclusionary clause that, by its terms, applied to those whose medical services *were* being paid for by OWCP. Pursuant to the administrative procedures set forth in 5 C.F.R.

§ 890.105, Mr. Nelson sought review of the decision from the Office of Personnel Management ("OPM"). Under FEHBA, OPM has the authority to order an insurer to pay a benefits claim. 5 U.S.C. § 8902(j). Instead, OPM ruled that "KPS's decision to deny benefits is contractually correct," citing the language of the exclusion clause quoted above. Pet. App. 17. OPM later issued a revised decision, explaining the process by which OWCP denied benefits to Mr. Nelson because of his third party lawsuit against the asbestos companies. Pet. App. 13-15. In this new decision, OPM again stated that its decision against Mr. Nelson was based on the language of the exclusionary clause in the summary of benefits quoted above. *Id.*

Mr. Nelson appealed OPM's decision to the federal district court of the Western District of Washington, which had jurisdiction of the matter pursuant to 5 U.S.C. § 8912. The district court upheld the denial of benefits, and Mr. Nelson appealed to the Ninth Circuit, which similarly upheld the denial of benefits, ruling that the workers compensation exclusion applied. The Court further quoted and apparently relied on a portion of the KPS summary of benefits that informs the insured when the carrier *will* pay benefits; it provides as follows:

Once OWCP or similar agency pays its maximum benefits for your treatment, we will cover your care. You must use our providers.

Pet. App. 42. This provision was not referred to by OPM in either of its decisions. Pet. App. 13-18.

Mr. Nelson outlived the odds and survived eight years following his diagnosis with mesothelioma. The cost of his cancer treatment during that period is at issue in this petition. He died on May 23, 2005; his widow has been

named as the personal representative of his estate and substituted as the appellant/petitioner in this matter.

REASONS FOR GRANTING THE PETITION

Certiorari is warranted in this case brought under the Federal Employees Health Benefits Act because the Ninth Circuit failed to apply federal common law regarding the interpretation of ambiguous provisions in insurance contracts. Thus its opinion is in conflict with the law of virtually every circuit that has ruled on the issue, including the Ninth Circuit.

Although the Court of Appeal's unpublished opinion did not expressly address the issue, the ambiguous nature of the contract language at issue is patent. The contract essentially says that the carrier will not pay benefits when OWCP is paying them. It says nothing about the situation such as Mr. Nelson's where OWCP found him to have an occupational disease but not eligible for payment of the cost of medical services because of his third party settlement. As to that scenario, the "workers compensation exclusion" in the contract is, at best, ambiguous.

The Court of Appeals also relied on a statement in the plan's summary of benefits that the carrier *will* pay for the insured's care, once OWCP has paid its maximum benefits. If this section of the plan summary was supposed to be part of the notice to the insured that the carrier would *not* provide coverage when OWCP had *not* paid any benefits, it certainly did not make that plain and clear. Thus, ambiguities exist in both contract provisions cited by the Court of Appeals for its decision, yet the Court applied an interpretation of the contract that *disfavored* the insured.

In the ERISA context, it has been held that an exclusionary clause may not be enforced unless it is set forth in language clear enough for an ordinary lay person to understand. *Saltarelli v. Baker Group Medical Trust*, 35 F.3d 382, 386 (9th Cir. 1994); *Phillips v. Lincoln National Life Ins. Co.*, 978 F.2d 302, 313 (7th Cir. 1992); *Kunin v. Benefit Life Ins. Co.*, 910 F.2d 534, 539-540 (9th Cir. 1990), *cert. denied*, 498 U.S. 1013, 111 S.Ct. 581, 112 L.Ed.2d 25 (1990); *Heller v. Equitable Life Assurance Society*, 833 F.2d 1253, 1256 (7th Cir. 1987). Where there is ambiguity, ERISA cases and federal common law have applied the principle of *contra proferentem* to hold that the interpretation that favors the *insured* applies. *Regents of University of Michigan v. Employees of Agency Rent-A-Car*, 122 F.3d 336, 340 (6th Cir. 1997); *Phillips*, 978 F.2d at 311-312; *Masella v. Blue Cross & Blue Shield of Connecticut, Inc.*, 936 F.2d 98, 107 (2nd Cir. 1991); *Kunin*, 910 F.2d 539-540; *see also*, *Heasley v. Belden & Blake*, 2 F.3d 1249, 1257-1258 (3rd Cir. 1993) (applying the doctrine of *contra proferentem* to interpret an ambiguous provision in an ERISA plan regarding the standard of review of the plan administrator's decision). Only the Eighth Circuit has held to the contrary, declining, on preemption grounds, to import the doctrine of *contra proferentem* from Missouri state law into the federal ERISA context. *Brewer v. Lincoln Nat. Life Ins. Co.*, 921 F.2d 150, 153-154 (8th Cir. 1990).

In this case, the Ninth Circuit Court of Appeals, citing no authority, interpreted contract provisions that did not by their terms cover the situation at issue in a manner that *disfavored* the insured. Its decision presents the question of whether law that has developed under ERISA and federal common law regarding the interpretation of ambiguous contract clauses applies to cases arising under